87-365

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRIAN CLEWER, INC.,
Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
TRANS WORLD AIRLINES, INC.,
BRITISH AIRWAYS plc,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), was intended to abolish notice pleading in actions filed pursuant to Section 4 of the Clayton Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brian Clewer, Inc., ("Clewer"), respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, entered on February 12, 1987.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is set out below as Appendix A, *infra*, at 1a-3a. The Order of the District Court for the Central District of California is set forth in Appendix B, *infra* at 4a-16a.[1]

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[1] Neither the opinion of the Court of Appeals nor of the District Court were reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 12, 1987, and is set out in Appendix C, *infra* at 16a. A petition for rehearing and rehearing en banc was denied on June 3, 1987. The order of denial is set out in Appendix D, *infra* at 18a.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States or with foreign nations is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. Section 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Section 4 of the Clayton Act, 15 U.S.C. Section 15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Fed.R.Civ.P. 8 provides in pertinent part:

> (a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, coun-

> ter-claim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .

STATEMENT

This case involves an alleged conspiracy by the respondents to divert purchasers in the market for air transportation services between Southern California and the United Kingdom from petitioner, a travel marketer who specialized in the sale of low-priced tickets on Laker Airways Limited.

The Complaint alleges the following facts. The petitioner, Clewer, has been engaged in the sale of low cost air transportation between Southern California and the United Kingdom since 1956. (App. E at 21a). Commencing in 1978, Clewer entered into a unique arrangement with Laker Airways Limited ("Laker") to specialize in the promotion and sale of tickets for Laker's flights between Los Angeles and the United Kingdom. Clewer provided this service at its own store and through its own network of representatives in the British-American community in Southern California. (App. E at 21a). Over the years, Clewer became closely identified by the public as the principal source in that geographic region to purchase Laker tickets. (App. E at 22a).

The respondents, Pan American, TWA and British Airways, are integrated marketers and providers of Southern California-U.K. air transportation services. The respondents competed directly against Clewer, as well as against Laker and each other, in the sale of tickets for air transportation between Southern California and the United iKngdom (App. E at 21a). Commencing sometime prior to 1980, the respondents conspired to restrain trade and monopolize the market for the sale of tickets for air transportation between Southern California and the United Kingdom by using unlawful means to divert ticket sales away from Clewer and Laker to

sales of their own and each others' tickets. (App. E at 22a). The respondents carried out this conspiracy, *inter alia*, by fixing prices below cost, making unlawful payments to divert customers from Clewer and by spreading rumors that Laker was going out of business. (App. E at 22a).

As a result of this unlawful conduct, customers were diverted from Clewer which resulted in a substantial and quantifiable loss to Clewer of revenues and profits on the sale of tickets and related travel services. (App. E at 23a).

PROCEEDINGS BELOW

On December 26, 1985, Clewer filed a complaint in the United States District Court for the Central District of California against the respondents alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The complaint alleged that the respondents were competitors of Clewer and that the respondents had engaged in anti-competitive conduct against Clewer.

On March 3, 1986, before responding to Clewer's discovery requests or initiating any discovery, the respondents filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that Clewer lacked standing to maintain an antitrust suit against them for conduct respondents contended was directed at Laker. On May 14, 1986, the district court granted the motion to dismiss without leave to amend. The district court held that Clewer did not satisfy the criteria set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). The district court rested its decision primarily on its conclusion that the injury to Clewer did not occur in the market in which respondents were conspiring to restrain trade. (App. B at pp. 11a-12a). The district court also concluded that Clewer's injury was remote (App. B at 12a-13a) that Clewer's injury was speculative and abstract (App. B at 14a) and that because other parties

had filed antitrust suits against the same defendants stemming from Laker's demise, there was a risk of duplicative damages.[2] (App. B at 14a).

The Court of Appeals issued a three page opinion affirming the district court. The appeals court concluded that while Clewer alleged that it competed with the respondents, the alleged restraints really occurred in a different market, *i.e.*, the market for production of airline service, and that petitioner had not alleged a market-wide restraint in the market for ticket sales. (App. A at 2a). The Court of Appeals also concluded that petitioner's injury was indirect and derivative because Laker, Laker's former employees and former passengers had also sued for antitrust damages. (App. A at 3a). A Petition for Rehearing and Suggestion for Hearing En Banc was filed which argued that Clewer was entitled to an opportunity to file an amended complaint to overcome the pleading problems raised by the Court of Appeals. The petition was denied without opinion. App. D at 18a.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Significant And Recurring Problems Concerning Pleading Requirements In Antitrust Cases

In *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this Court stated that a complaint "should not be dismissed

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[2] Three other antitrust actions were filed by different plaintiffs based on different facts involving different markets. A suit by the Laker liquidator against eleven defendants including the respondents was settled by the satisfaction of all of Laker's creditors and a payment to the stockholders of Laker. An action by travellers in the U.S.-U.K. market after Laker's demise against the respondents was settled by providing credits against the cost of future flights by members of the class. A suit by certain former employees of Laker for damages arising out of the destruction of their livelihood is pending in the Court of Appeals for the D.C. Circuit on appeal from a grant of a motion to dismiss for lack of standing.

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This Court also stated that pleadings are intended to give defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. The Court concluded,

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 48.

The *Conley* principle of notice pleading applies to antitrust cases.[3] Indeed, in its seminal decision on antitrust standing, *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court "stretch[ed]" the rule of *Conley* to give the plaintiff Union every possible advantage in asserting its claim. *Id.* at 518 n.17. This Court expressly noted that the district court in *Associated General Contractors*, had given the Union "adequate opportunity" to amend its Complaint. *Id.* at p. 526 n.11. In its analysis of the Union's claim, this Court set forth factors to be considered, and advised lower courts to "analyze each situation in light of the factors." *Id.* at 536 n.33. In applying these factors to the Union's claim, this Court carefully considered each allegation and went so far as to recast some of the plaintiff's claims to place them in the most favorable light vis a vis the Sherman Act. *Id.* at 541 n.46. This Court's approach was in keeping with its longstanding precedents that the Sherman Act is a broad remedial statute. *Id.* at 529-530.

Despite this Court's care in *Associated General Contractors* not to alter the liberal pleading standards of

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[3] *See generally*, R. Marcus, "The Revival Of Fact Pleading Under The Federal Rules of Civil Procedure," 86 Col.L.Rev. 433 (1986).

Conley v. Gibson, it appears that many lower federal courts have adopted the view that the factors set forth in *Associated General Contractors* are to be treated as technical pleading requirements. In the almost five years since *Associated General Contractors*, it now appears that whether a plaintiff in an antitrust case will withstand a motion to dismiss for lack of standing will depend on counsel's luck in drafting the pleadings on every element of the claim in a way that happens to satisfy a particular district court judge rather than on giving fair notice to the defendants of the nature of the claim.[4]

In this case, the principal factor relied upon by the Court of Appeals to deny Clewer standing was that the complaint did not allege that "output has been curtailed or prices enhanced throughout [the] entire [relevant] market". App. A at 2a-3a citing *Associated General Contractors*, at 539 n.40. The Court of Appeals determined that the unlawful activity occurred in the market for the production of airline service where Clewer was not a competitor. App. A at 2a.

Clewer alleged that it was a direct competitor of the respondents in the market for the *sale* of tickets for air transportation between Southern California and the United Kingdom. Clewer also alleged that the respondents *intended to* and *did divert* customers from Clewer to their own business through predatory pricing and the other unlawful tactiss set forth in the complaint.

In any event, Clewer certainly was entitled to an opportunity to amend the complaint—which petitioner be-

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[4] *See*, E. Brunet and D. Sweeney, "Integrating Antitrust Procedure and Substance After *Northwest Wholesale Stationers*: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts," 72 Va.L.Rev. 1015, 1071-74 (1986); S. Calkins, "Summary Judgment, Motions To Dismiss, and Other Examples of Equilibrating Tendencies In The Antitrust System," 74 Geo.L.J. 1065, 1101-09 (1986).

lieves it could do successfully—to plead sufficient facts to demonstrate a marketwide restraint in the market for the sale of tickets for air transportation between Southern California and the United Kingdom as well as to satisfy the lower courts' concerns related to the other factors governing antitrust standing. *See, e.g., Brandon v. Holt*, 464 U.S. 469, 471 n.19 (1985); *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1955).

While one may differ as to the artfulness of the complaint, it comes well within the pleading requirements set forth in *Conley v. Gibson*.[5] Potential antitrust plaintiffs are entitled to guidance from this Court as to whether it intended *Associated General Contractors* to impose technical pleading requirements on private litigants who file suit under Section 4 of the Clayton Act. If technical pleadings are required then this Court should instruct the lower courts to allow plaintiffs a reasonable opportunity to amend.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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[5] The district court and Court of Appeals in their analysis of the factors outlined in *Associated General Contractors* went well beyond the scope of the pleadings in formulating reasons to reject petitioner's standing. Both courts undertook a fact analysis inconsistent with the concept of notice pleading.

APPENDICES

APPENDIX A

(Opinion of the Court of Appeals)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 86-6003

D.C. No. CV-86-119-CBM

BRIAN CLEWER, INC.,
Plaintiff-Appellant,
v.
PAN AMERICAN WORLD AIRWAYS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Hon. Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted February 6, 1987—Pasadena, CA

[Filed Feb. 12, 1987]

MEMORANDUM*

BEFORE: KENNEDY, SKOPIL and KOZINSKI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

Clewer challenges the district court's dismissal of his action for lack of standing under § 4 of the Clayton Act. Because a determination of standing is a question of law, we review the district court's decision de novo. *Bubar* v. *Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir.), *cert. denied*, 105 S. Ct. 3481 (1985).

In *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 538-45 (1983), the Supreme Court enumerated the factors to be evaluated in determining whether a plaintiff has standing to bring an antitrust action. We summarized these factors in *Bubar*:

> "(1) the nature of the plaintiff's alleged injury—whether it was the type the antitrust laws were intended to forestall,
>
> (2) the directness of the injury,
>
> (3) the speculative measure of the harm,
>
> (4) the risk of duplicative recovery, and
>
> (5) the complexity in apportioning damages.

752 F.2d at 449. *See Los Angeles Memorial Coliseum Com'n* v. *NFL*, 791 F.2d 1356, 1363 (9th Cir. 1986). We are persuaded that the balance of these factors weigh against affording Clewer standing in this case.

Clewer is neither a consumer nor a competitor in the market in which trade is alleged to have been restrained. Therefore, his alleged injury is not of the type that the antitrust laws were meant to prevent. *See Associated General Contractors*, 459 U.S. at 538-39. Clewer alleges that it competes with appellees in the marketing of air transportation in the Southern California area. This market does not involve the production of airline service between the United States and the United Kingdom, but rather is limited to the distribution of airline tickets in Southern California. Clewer's complaint does not allege that "output has been curtailed or prices enhanced

throughout [the] entire [relevant] market." *Id.* at 539 n.40. Rather, Clewer's allegations concern conduct in the air transportation market in which appellants and Laker competed, but in which Clewer concededly was neither a consumer nor a competitor.

Clewer's alleged injury is also indirect; it is derivative of whatever harm may have been suffered by Laker. In evaluating the directness of injury for standing purposes, the Supreme Court noted in *Associated General Contractors*:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.

Id. at 542. As in *Associated General Contractors*, "[d]enying [Clewer] a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* Three other actions have been brought in connection with the alleged conspiracy of appellant airlines to put Laker out of business: by Laker, by Laker's former passengers and by Laker's former employees. We agree with the district court that the plaintiffs in these actions are all in a better position to assert harm than Clewer and to vindicate the public interest in remedying antitrust violations.

We also agree with the district court that the other policy factors discussed in *Associated General Contractors* and *Bubar*—speculative measure of harm, risk of duplicative recovery, and complexity in apportioning damages—militate against a finding that Clewer has standing.

AFFIRMED.

APPENDIX B

(Opinion of the District Court)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-119 CBM

BRIAN CLEWER, INC., a California corporation dba AMBASSADOR INTERNATIONAL TRAVEL,
Plaintiff,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation; TRANS WORLD AIRLINES, INC., a New York corporation; BRITISH AIRWAYS plc., a foreign corporation,
Defendants.

[Filed May 19, 1986]

MEMORANDUM ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on defendants Pan American World Airways, Inc., Trans World Airlines, Inc., and British Airways' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6). Defendants also move to transfer this action to the United States District

Court of the District of Columbia.[1] The issue presented by defendants' motion to dismiss is whether plaintiff Brian Clewer, Inc. has standing under § 4 of the Clayton Act to bring a suit for alleged antitrust violation against defendant airlines. A hearing was held on May 5, 1986, before the Honorable Consuelo B. Marshall, United States District Court Judge, presiding.

FACTS

Plaintiff Brian Clewer, Inc., dba Ambassador International Travel, brings this antitrust suit for violation of §§ 1 and 2 of the Sherman Act claiming treble damages pursuant to § 4 of the Clayton Act for alleged injuries sustained to its business due to the conduct of defendants Pan American World Airways, Inc., Trans World Airlines, Inc., and British Airways.

Plaintiff is a travel agency "engaged in the sale of air transportation and related services in Southern California, Arizona and Nevada." (Complaint, ¶ 3). According to the complaint, plaintiff had a contractual agreement with Laker Airways Limited ("Laker") whereby plaintiff sold tickets on Laker's flights between Los Angeles and the United Kingdom to its own customers and other travel agents in Southern California in exchange for commissions by Laker in excess of those paid to other Laker ticket sellers. (Complaint, ¶ 7). Plaintiff characterizes itself as a "marketer of air transportation and related services" or "distributor or jobber" selling the product, i.e., the airline tickets, which were "produced" or "manufactured" by Laker. (Opposition to Motion to Dismiss, at 16-17). By this contractual arrangement, the complaint alleges that defendant airlines "directly competed with Clewer for the sale of air transportation and

[1] The Court will not address defendants' motion to transfer this action to the United States District Court of the District of Columbia since the motion to transfer has become moot due to the Court's decision granting defendants' motion to dismiss.

related services between Southern California and the United Kingdom." (Complaint, ¶ 8).

According to the complaint, defendant airlines and other unnamed entities conspired "to restrain and to monopolize trade and commerce in Southern California for the sale of air transportation between Southern California and the United Kingdom" (Complaint, ¶ 10). The alleged antitrust violation is described as follows:

> "12. The defendants agreed with each other and with others to fix prices for air transportation between Southern California and the United Kingdom. The defendants agreed with each other and with others to charge prices for air transportation between Southern California and the United Kingdom which were predatory with the object of diverting passengers from Laker's services and damaging Clewer's business. In further pursuit of their unlawful scheme, the defendants made excessive and unlawful payments to divert customers from Clewer. The defendants coordinated the scheduling of their Los Angeles-London flights to divert passengers to their services who might otherwise have flown on Laker and bought tickets from Clewer. The defendants spread false rumors that Laker was going out of business which damaged Clewer's business.
>
> 13. The defendants conspired with each other and with others to force Laker out of business. After Laker ceased operations, the defendants refused Clewer's requests to enter into commercially reasonable arrangements with Clewer."

(Complaint, ¶¶ 12, 13).

DISCUSSION

§ 4 of the Clayton Act broadly defines the class of persons who may maintain a private damages action under the antitrust laws. § 4 provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Although the above language is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of antitrust violation, the Supreme Court has interpreted the statute to be subject to certain constraints. *Associated General Contractors vs. Carpenters*, 459 U.S. at 534. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534, *citing, Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n.14 (1972). "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad working of § 4 there is a point beyond which the wrongdoer should not be held liable.... It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Id.* at 534-535, *citing, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982).

Accordingly, courts must determine whether an antitrust plaintiff is a proper party to bring a private antitrust action. *Id.* at 535, n.31. This determination "requires an inquiry beyond that performed to determine standing in a constitutional sense." *Bubar v. AMPCO Foods, Inc.*, 752 F.2d 445, 448 (9th Cir.), *cert. denied*, 105 S.Ct. 3481 (1985). Indeed, the determination of whether an antitrust plaintiff has standing to recover

under the Clayton Act requires an "evaluation of plaintiff's harm, the alleged wrongdoing by the defendant, and relationship between them." *Id.* at 448-449.

In *Associated General*, the Supreme Court cautioned against the mechanical use of black letter rules to dictate a particular result, and instead instructed the lower courts to analyze each factual situation in light of the policy factors discussed in its opinion. *Associated General*, 459 U.S. at 536, n.33. In *Bubar*, the Ninth Circuit summarized those policy factors as follows:

> "1) the nature of the plaintiff's alleged injury—whether it was the type the antitrust laws were intended to forestall,
>
> 2) the directness of the injury,
>
> 3) the spectulative measure of the harm,
>
> 4) the risk of duplicative recovery, and,
>
> 5) the complexity in apportioning damages."

Bubar, 752 F.2d at 449.

Accordingly, each of the policy factors will be discussed herein.

1) Clewer's Alleged Injury.

In order to establish that the injury sustained by a § 4 plaintiff is the type of injury the antitrust laws were intended to forestall, plaintiffs

> "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat. Inc., 429 U.S. 477, 489 (1977).

In the present case, the complaint alleges in conclusory terms that "Clewer's injury was of the type of injury that the antitrust laws were intended to forestall. Clewer was a direct competitor of defendants. The defendants' conduct resulted in the diminution of competition in the market." (Complaint, ¶ 15). At the outset, it should be noted that in a motion to dismiss pursuant to F.R.Civ.P. 12(b)(6), the complaint should be construed in the light most favorable to plaintiff and its allegations taken as true. However, courts do not have to accept every allegation in the complaint as true in considering its sufficiency; rather, courts will examine whether conclusory allegations follow from the description of facts as alleged by plaintiff. 5 *Wright & Miller*, § 1357 at 595-597.

According to the complaint, Clewer's alleged injury stems from defendant airlines' conspiracy to fix predatory prices for airline tickets with the object of diverting customers from Laker to harm Clewer; to spread false rumors that Laker was going out of business; to force Laker out of business; and to refuse to enter into commercially reasonable commission arrangements with Clewer. Thus, the complaint does allege a causal connection between an antitrust violation and harm to Clewer and further alleges that the defendant airlines intended to cause that harm. "[H]owever, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. . . . an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated General*, 459 U.S. at 537. "The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *Id., citing, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982).

The Sherman Act was enacted to assure customers the benefits of price competition and case-law has emphasized the central interest in protecting the economic freedom of participants in the relevant market. *Associated General*, 459 U.S. at 538. Plaintiff's complaint does not allege any marketwide restraint of trade; rather, it alleges unlawful conduct involving predatory behavior directed at Laker, with an adverse result to Clewer, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market. *Associated General*, 459 U.S. at 539, n.40.[2]

In *Associated General*, plaintiff Union brought an action against defendant multiemployer association on the grounds that defendant coerced certain third parties and certain of plaintiff's members to enter into business relationships with nonunion contractors and subcontractors, and such action adversely affected Union's business activities. Under such circumstances, Union was not held to be a consumer or competitor in the market in which trade was restrained, and thus had no standing to assert an antitrust violation. *cf. Blue Shield of Virginia v. McCready*, 457 U.S. at 484 (consumer of psycho-

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[2] This case is distinguishable from *Klor's v. Broadway-Hale Store*, 359 U.S. 207 (1959) in which a retailer was held to have standing to sue a chain of department stores, national manufacturers and their distributors for an antitrust conspiracy to boycott the sale of goods to plaintiff or to do so only at discriminatory prices and highly unfavorable terms. Such actions which cripple the freedom of traders and thereby restrain their ability to sell in accordance with their judgment were held to be monopolistic actions forbidden by the Sherman Act. Unlike *Klor's*, Clewer has not alleged any monopolistic boycott on the part of the defendant airlines against Clewer personally nor any action that would cripple the freedom of travel agencies from booking flights in an open competitive airline ticket market. Instead, the complaint appears to focus on Clewer's inability to sell as many Laker tickets as it previously had and Clewer's inability to enter into a commission agreement with defendant airlines which was as commercially lucrative as its previous arrangement with Laker.

therapeutic services had standing to sue for antitrust conspiracy to restrain competition in the market for such services since her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market."); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739 (9th Cir. 1984) (Kennedy, J, dissenting) (former employee who alleged that he had been discharged and boycotted because of refusal to participate in bid rigging scheme held to have standing to challenge conspiracy to fix prices and allocate sales in the market).

Relying on *Associated General*, defendant airlines assert that Clewer has not suffered any cognizable antitrust injury since Clewer, as a seller of Laker's tickets, was neither a consumer nor competitor in the market in which Laker and defendants competed. Clewer concedes that it is not a consumer nor competitor in the market in which Laker and the defendants competed; however, plaintiff alleges the violation is in a different geographical and functional market. (Opposition to Motion to Dismiss, at 16-17). Clewer defines his market as a distribution or "marketing level of air transportation [in Southern Califorinia] as opposed to the production level" of air transportation in the United States.

The use of the ambiguous terms "marketing" and "production" levels of "air transportation" fails to disguise the practical realities of the markets involved: plaintiff's market does not involve national airline companies involved in providing air transportation between the United States and the United Kingdom, but instead involves Southern California ticket sellers involved in merely distributing the tickets of Laker airlines. The complaint alleges that "the defendants agreed with each other and with others to fix prices for air transportation between Southern California and the United Kingdom," (Complaint, ¶ 12), and that "the defendants agreed with each other and with others to charge prices for air trans-

portation between Southern California and the United Kingdom which were predatory with the object of diverting passengers from Laker and damaging Clewer's business." (Complaint, ¶ 13). These allegations go to an antitrust conspiracy in the airline market in which defendants and Laker competed, and not to the market for the sale of airline tickets. Therefore, the complaint fails to state a cognizable antitrust injury sufficient to confer standing. Based upon plaintiff's characterization of the antitrust violations in the complaint, it is clear that Clewer's alleged injury is not the type injury that the antitrust laws were intended to forestall.

2. The Directness of the Injury.

In *Associated General*, the Supreme Court examined the degree to which the asserted injury flowed directly from the alleged violation, and determined that the "chain of causation between the [plaintiff's] injury and the alleged restraint in the market . . . contains several somewhat vaguely defined links." *Id.* at 540. *Bubar*, 752 F.2d at 453 (potential minority shareholders in a corporation yet to be formed not directly injured). Likewise, the present case also contains links in the chain of causation between Clewer's injury and the alleged restraint in the market.

According to Clewer's complaint, defendant airlines conspired to fix predatory prices and engaged in other anticompetitive actions to divert business from Laker and thereby harm Clewer's business. It is obvious that any injury to Clewer is only an indirect result of whatever harm may have been suffered by Laker, and thus Clewer's injury is derivative of those of Laker's.

In addition, "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as [the plaintiff] Union to perform the office

of a private attorney general." *Associated General*, 459 U.S. at 542.

Defendant airlines suggest that other potential plaintiffs exist here who have claimed more direct harm from the alleged violations than Clewer. The present lawsuit is apparently the fourth in a series of lawsuits filed against defendant airlines for an alleged conspiracy to eliminate Laker from competition. The first action, brought by Laker, was settled in 1985. *Laker Airways Limited v. Pan American World Airways, Inc.*, No. 82-3362 (D.D.C.). The second action, a consolidation of five class actions brought by Laker passengers who bought tickets between March 1982 and March 1984, has concluded in a preliminary settlement awaiting court approval. *In re North Atlantic Air Travel Antitrust Litigation*, No. 84-1013 (D.D.C.). The third suit is brought by 331 former Laker employees is presently pending before the District Court for the District of Columbia. *Adams v. Pan American World Airways, Inc.*, No. 86-304 (D.D.C.). All of the plaintiffs in the above actions stand in a better posture to assert antitrust claims due to a more direct harm than the present plaintiff.

Defendants aptly notes that Clewer stands in the same position of numerous other prospective plaintiffs whose alleged losses are indirect and derivative, i.e., other travel agencies, other supplies of goods and services, food vendors, waste disposal services, and custodians. Regardless of whether the statute of limitations would operate as a bar to other prospective plaintiffs' claims, Clewer's injury is too indirect to provide standing under the Clayton Act.

3) The Speculative Measure of the Harm.

According to the complaint, "Clewer suffered lost revenues and profits as a direct result of the defendants' unlawful conduct in violation of the antitrust laws." (Complaint, ¶ 14). Clewer alleges that its measure of

damages is what Clewer would have earned if the market had not been distorted by the defendants' anticompetitive conduct, and is not measured by Laker's damages whatsoever.

In contrast, defendants allege that in order to prove Clewer's damages, Clewer must first establish the extent to which Laker was injured by the alleged antitrust violation, and then establish Clewer sustained such damages. Since Clewer's profits depended largely on the commission obtained from the sale of Laker tickets, defendants' position correctly assesses the speculative nature of the purported damages. As in *Associated General*, the present claim "rests at bottom on some abstract conception or speculative measure of harm." *Associated General*, 459 U.S. at 543 (citations omitted).

4) Risk of Duplicative Recoveries and the Complexity of Apportioning Damages.

Because of the previous claims filed by other plaintiffs against the same defendant airlines for a portion of Laker's revenues, a possibility exists of duplicative recovery against the defendants. In addition, if Clewer and other similarly situated travel agencies are found to have standing to bring antitrust suits against the same defendants, there is a distinct possibility of numerous recoveries for the same antitrust violation. Although Clewer attempts to narrow the geographical scope of the complaint to Southern California, other regional travel agencies could also bring similar lawsuits notwithstanding the statute of limitations period for filing claims. Allowing such indirect plaintiffs to file suits for speculative harms would stretch the parameters of § 4 of the Clayton beyond its intended purpose.

Based upon the above discussion, the Court concludes that plaintiff Clewer does not have standing under § 4 of the Clayton Act to bring a private cause of action for treble damages for an alleged antitrust violation. There-

fore, the Court hereby grants defendants' motion to dismiss the lawsuit for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6).

IT IS SO ORDERED.

DATED: MAY 14, 1986.

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
Judge
United States District Court

APPENDIX C

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6003

DC #CV-86-119-CBM

BRIAN CLEWER, INC.,
Plaintiff-Appellant,
vs.

PAN AMERICAN WORLD AIRWAYS, *et al.*,
Defendants-Appellees.

[Filed June 15, 1987]

Appeal from the United States District Court
for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
Jun. 11, 1987
ATTEST
Clerk of Court

By: /s/ Joseph Williams
Deputy Clerk

Filed and entered February 12, 1987

APPENDIX D

(Order Denying Petition for Rehearing)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6003

BRIAN CLEWER, INC.,
Plaintiff-Appellant,
v.

PAN AMERICAN WORLD AIRWAYS, *et al.*,
Defendants-Appellees.

[Filed June 3, 1987]

ORDER

Before: KENNEDY, SKOPIL and KOZINSKI, Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court having requested a vote on it, the suggestion is rejected. Fed. R. App. P. 35(b).

APPENDIX E

(Complaint)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.

BRIAN CLEWER, INC., a California corporation
dba AMBASSADOR INTERNATIONAL TRAVEL,
Plaintiff

v.

PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation; TRANS WORLD AIRLINES, INC., a New York corporation; BRITISH AIRWAYS plc, a foreign corporation,
Defendant.

COMPLAINT

(Violation of Antitrust Laws,
15 U.S.C. §§ 1 and 2)

Brian Clewer, Inc., a California corporation dba Ambassador International Travel ("Clewer"), acting through its attorneys, brings this civil action against the defendants named above and complains and alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and this action is instituted under Section 4 of the Clayton Act (15 U.S.C. § 15), to secure damages for defendants' violations, as alleged in this Complaint, of Sections 1 and 2 of the Sherman Act

(15 U.S.C. §§ 1 and 2), and for other relief, as set forth below. Jurisdiction is conferred upon this Court by 15 U.S.C. § 15, by 28 U.S.C. § 1337. Venue is properly laid in this district pursuant to Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22) and 28 U.S.C. § 1391.

2. Each of the defendants transacts and does business, can be found or has an agent within the Central District of California and is otherwise amenable to the personal jurisdiction of this Court.

THE PARTIES

3. Plaintiff, Brian Clewer, Inc., is a California corporation. Clewer does business as "Ambassador International Travel," a business engaged in the sale of air transportation and related travel services in Southern California, Arizona and Nevada ("Southern California").

4. Defendant Pan American World Airways, Inc. ("Pan Am") is a New York corporation with its headquarters in New York, New York. Pan Am sells scheduled and charter air transportation between Southern California and the United Kingdom. Pan Am transacts and does business within Los Angeles at 5959 West Century Boulevard, Suite 920.

5. Defendant Trans World Airlines, Inc. ("TWA") is a New York corporation with its headquarters in New York, New York. TWA sells scheduled and charter air transportation between Southern California and the United Kingdom. TWA transacts and does business within Los Angeles at 1545 Wilshire Boulevard, Suite 400.

6. Defendant British Airways plc ("British Airways") is a foreign corporation with its headquarters in Hounslow, Middlesex, England. British Airways sells scheduled and charter air transportation between Southern

California and the United Kingdom. British Airways transacts and does business within Los Angeles at 1901 Avenue of the Stars, Suite 1000.

TRADE AND COMMERCE

7. Commencing in 1956 and continuing at all relevant times, Clewer has engaged in the sale of low cost air transportation and related services between Southern California and the United Kingdom. Commencing in 1978 and continuing until February 5, 1982, Clewer had contractual arrangements with Laker Airways Limited ("Laker") whereby Clewer sold air transportation on Laker's flights between Los Angeles and points in the United Kingdom. Clewer agreed to and did advertise and promote Laker's air transportation services in Southern California. Clewer agreed to and did sell Laker's tickets directly to customers and also through agents in Southern California. Clewer was paid commissions by Laker in excess of those paid to other sellers in Southern California of Laker's services. As a result of Clewer's arrangements with Laker, Clewer developed substantial revenues from the sale of Laker's low-cost air transportation and related services between Southern California and the United Kingdom.

8. Defendants Pan Am, TWA and British Airways also advertised, promoted and sold air transportation and related services in the Southern California area in which Clewer did business. Defendants Pan Am, TWA and British Airways directly competed with Clewer for the sale of air transportation and related services between Southern California and the United Kingdom.

9. As the defendants well knew, Clewer was a substantial generator of revenues for Laker in Southern California. Clewer was well established in Southern California. Clewer had long-standing relationships with the British-American community in Southern California. He

was a radio celebrity. Clewer was closely identified in the public mind with Laker through Clewer's advertising and promotional efforts.

VIOLATION OF THE ANTITRUST LAWS

10. Beginning at least in 1980, the defendants and others combined and conspired unreasonably to restrain and to monopolize trade and commerce in Southern California for the sale of air transportation between Southern California and the United Kingdom in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

11. The defendants dominated the Southern California market for sale of air transportation between Southern California and the United Kingdom. The defendants had monopoly power in the market for sale of Southern California-United Kingdom air transportation in which they competed with Clewer. The defendants had the power to fix prices for air transportation between Los Angeles and the United Kingdom.

12. The defendants agreed with each other and with others to fix prices for air transportation between Southern California and the United Kingdom. The defendants agreed with each other and with others to charge prices for air transportation between Southern California and the United Kingdom which were predatory with the object of diverting passengers from Laker's services and damaging Clewer's business. In further pursuit of their unlawful scheme, the defendants made excessive and unlawful payments to divert customers from Clewer. The defendants coordinated the scheduling of their Los Angeles-London flights to divert passengers to their services who might otherwise have flown on Laker and bought tickets from Clewer. The defendants spread false rumors that Laker was going out of business which damaged Clewer's business.

13. The defendants conspired with each other and with others to force Laker out of business. After Laker

ceased operations, the defendants refused Clewer's requests to enter into commercially reasonable arrangements with Clewer.

INJURY AND STANDING

14. Clewer suffered lost revenues and profits as a direct result of the defendants' unlawful conduct in violation of the antitrust laws. The defendants knew that their unlawful conduct would injure Clewer's business and property. The defendants intended to cause injury to Clewer.

15. Clewer's injury was the type of injury that the antitrust laws were intended to forestall. Clewer was a direct competitor of the defendants. The defendants' conduct resulted in the diminution of competition in the market.

16. Clewer was a direct victim of defendants' conduct. Defendants intended to and did divert customers from Clewer's business to their own competing businesses.

17. No other victims of defendants' conduct are conducting legal proceedings to vindicate the public interest in enforcement of the antitrust laws in regard to defendants' conduct in the market in Southern California for sale of air transportation between Southern California and the United Kingdom. Laker has settled its own antitrust proceedings on terms that did not establish that there was any violation of the antitrust laws. Class actions under the antitrust laws by consumers of U.S.-U.K. air transportation have also been settled on terms that did not establish that there was any violation of the antitrust laws. The Grand Jury investigation of defendants' conduct was terminated by direct order of President Reagan prior to the issuance of indictments.

18. Clewer's damage is not remediable under other laws. Clewer's damages are readily identifiable and ascertainable.

19. The trial of this action will not be complex. There is no risk of duplicative recovery and there are no problems of complex apportionment of damages. Clewer has standing to pursue this action.

PRAYER FOR RELIEF

20. Because of defendants' unlawful conduct as alleged in this complaint, Clewer demands judgment and prays

a. For judgment against the defendants, jointly and severally, for the injury to Clewer's business and property, in such amount as shall be determined after trial, to be trebled as provided by law;

b. For interest, costs and attorneys' fees as provided by law; and

c. For such other and further relief as the Court decides is just and proper.

21. Plaintiff demands a jury trial.

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Attorneys for Plaintiff
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Supreme Court, U.S.
FILED
OCT 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRIAN CLEWER, INC.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
TRANS WORLD AIRLINES, INC.,
BRITISH AIRWAYS Plc,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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STATEMENT PURSUANT TO RULE 28.1

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents are as follows:

British Airways Plc

- Airline Tariff Publishing Company
- Air Mauritius Ltd.
- The Airplus Company Ltd.
- Alta Holidays Ltd.
- Beau Vallon Properties Ltd.
- Belfast Europa Ltd.
- Brussels Europa Societe Anonyme
- Eupo-Air Holdings Ltd.
- Eupo-Air Travel Services Ltd.
- GB Airways Ltd.
- Holts Paris Welcome Service S.A.
- IAL Caribbean Ltd.
- Isotal (Imobiliaria Do Sotavento Do Algarve)
- Karsy Walk Inn Ltd.
- Kenya Safari Lodges & Hotels Ltd.
- Los Angeles Technical Services Corp.
- Mosside Enterprises Ltd.
- Penta Hotels N.V.
- The Plimsoll Line Ltd.
- San Francisco Foreign Flag Carrier Corp.
- Sun Resorts Ltd.
- Tourism Promotion Services (Kenya) Ltd.
- Tourism Promotion Services (Uganda) Ltd.
- Travel Automation Services Ltd.

Pan American World Airways, Inc.

- Aeronautical Radio, Inc.
- Air Cargo, Inc.
- Airline Tariff Publishing Company
- Escola Americana de Rio de Janeiro
- Honolulu Fueling Facilities Corporation
- International Aeradio (Caribbean) Ltd.
- Liberian Development Corporation
- Manhattan Air Terminal, Inc.
- Nigerian Aviation Handling Co.
- Pan Am Corporation
- Promotora de Hoteles de Turismo Medellin, S.A.
- Radio Aeronautica Paraguaya, S.A.
- Social Immobiliaria Norteamericana, S.A.
- Societe de Tourisme et Representation
- Societe International de Telecommunications Aeronautiques

Trans World Airlines, Inc.

- Aero Limited Partnership

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-365

BRIAN CLEWER, INC.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
TRANS WORLD AIRLINES, INC.,
BRITISH AIRWAYS Plc,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Contrary to the arguments made in the petition for certiorari, this case does not raise questions concerning the application of technical pleading rules. The complaint was dismissed not because essential allegations were omitted from the complaint, but because it was found that petitioner was not a consumer or competitor in the relevant market and that the injury alleged by petitioner was derivative of an injury suffered by a competitor in the relevant market that had already vindicated its and the public's interest in en-

forcement of the antitrust laws. Amendment of the pleadings could not change these dispositive facts and conclusions.

Put differently, the question presented by this case is whether the petitioner travel agent has antitrust standing to seek treble damages for injuries purportedly sustained as a result of an alleged conspiracy among the respondent airlines to eliminate a competing airline.

Using the analysis mandated by the Court in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), both the District Court and the Ninth Circuit concluded without dissent that petitioner lacks antitrust standing. That decision was inescapable after a consideration of the factors identified in *Associated General Contractors*. The factual and legal basis of that decision could not be affected by any consistent amendment. This case presents no novel or significant issue for the Court to decide. The petition should be denied.

STATEMENT OF THE CASE

This action is one of four antitrust suits growing out of the collapse of Laker Airways Limited ("Laker") in February 1982. Each suit has been predicated on the same alleged conspiracy to eliminate Laker as a competitor in air transportation between the United States and the United Kingdom. This suit—particularly when considered in light of these related litigations—is a perfect example of why Congress did not intend to allow every person tangentially affected by an alleged antitrust violation to maintain an action to recover treble damages. *Blue Shield* v. *McCready*, 457 U.S. 465, 477 (1982).

The first suit was brought by Laker itself in the United States District Court for the District of Columbia against ten airlines, an aircraft manufacturer, and its financing subsidiary ("*Laker I*").[1] This suit was settled on October 1, 1985. *See Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683, 684 (D.D.C. 1986).

The second litigation, consisting of a number of consolidated class actions, was brought by passengers who claimed that, as a result of the alleged conspiracy, they were forced to pay higher fares for U.S./U.K. air transportation than they would have paid if Laker had remained in the market ("*Laker II*").[2] Judge Harold H. Greene approved the settlement of these claims on March 18, 1986. *See* 640 F. Supp. at 684 n.5.

After the first two actions were settled, Laker's counsel brought yet another suit on behalf of 313 former employees of Laker against all of the defendants in *Laker I* plus two additional airlines.[3] The District Court for the District of Columbia dismissed the employees' suit on June 30, 1986, for lack

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[1] *Laker Airways Ltd.* v. *Pan Am. World Airways, Inc.*, No. 82-3362 (D.D.C. filed Nov. 24, 1982); *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983); *Laker Airways Ltd.* v. *Union de Transport Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983). These three actions were consolidated on November 11, 1983.

[2] *In re North Atl. Air Travel Antitrust Litig.*, No. 84-1013 (D.D.C. filed Mar. 30, 1984).

[3] *Adams* v. *Pan Am. World Airways, Inc.*, No. 86-0304 (D.D.C. filed Feb. 3, 1986); *Clifton* v. *Pan Am. World Airways, Inc.*, No. 86-0629 (D.D.C. filed Mar. 7, 1986). These actions were consolidated on March 13, 1986. *See* 640 F. Supp. at 683 n.1.

of antitrust standing. *Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683 (D.D.C. 1986). The Court of Appeals for the District of Columbia Circuit affirmed, on September 1, 1987. *Adams* v. *Pan Am. World Airways, Inc.*, No. 86-5468, slip op. (D.C. Cir.).

The present suit was also brought by Laker's former counsel, after the first two actions were settled. *Brian Clewer, Inc.* v. *Pan Am. World Airways, Inc.*, No. 86-6003 (C.D. Cal. filed Jan. 7, 1986). It was brought on behalf of a Los Angeles travel agent against three of the airlines that have been defendants in each of the other Laker-related actions. *See Adams* v. *Pan Am. World Airways, Inc., supra*, 640 F. Supp. at 684 n.7; petition at 13a. The District Court for the Central District of California dismissed the suit on May 14, 1986, on the ground that petitioner lacks antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. § 15. Petition at 4a-15a.

More specifically, the court performed the analysis mandated by *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and concluded that every one of the four factors noted in that decision required dismissal. The court held that the injury Clewer alleged is "too indirect to provide standing under the Clayton Act," petition at 13a, and "is not the type [of] injury that the antitrust laws were intended to forestall," *id.* at 12a, that the damages Clewer alleged are speculative, *id.* at 14a, and that there is a risk of duplicative recovery against the respondent airlines, *id.*

On February 12, 1987, the Court of Appeals for the Ninth Circuit affirmed. 811 F.2d 1507. The Ninth Circuit based its decision upon each of the several grounds relied upon by the District Court and ex-

plicitly held that Clewer's alleged harm "is derivative of whatever harm may have been suffered by Laker." Petition at 3a. There was no dissent.

Clewer sought rehearing en banc, arguing for the first time that it should be granted leave to amend the complaint.[4] Clewer had waited over five years after its alleged claim arose, a full year after filing its complaint, and after the District Court and the Ninth Circuit had rendered their decisions based upon full briefing and oral argument by both sides before raising this issue. The petition was denied, "no active judge of the court having requested a vote on it." Petition at 18a.

A petition for a writ of certiorari was filed on September 1, 1987.

REASONS FOR DENYING THE PETITION

After the two courts below decided that Clewer lacks antitrust standing to challenge an alleged conspiracy that already has been litigated and settled by two different groups of plaintiffs, Clewer now claims that it was the victim of an improper application of "technical pleading requirements." Petition at 8. Nothing could be further from the truth. Clewer's complaint was dismissed not because it lacked certain required allegations, but because it alleged certain facts—which clever redrafting cannot now erase—that demonstrate Clewer is not a proper party to bring this action. The dismissal of the complaint thus had nothing to do with "luck in drafting the pleadings." Petition at 7. Instead, dismissal was the result of the

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[4] Appellant's Petition For Rehearing and Suggestion For Rehearing En Banc, No. 86-6003 (C.D. Cal. filed Feb. 26, 1987).

routine application of the standards for determining antitrust standing established in *Associated General Contractors*.

Because Clewer's complaint establishes that Clewer's alleged injury is derivative of the injury suffered by Laker, it is "beyond doubt that [Clewer] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal of Clewer's complaint was required because Clewer is not a proper party to bring an antitrust suit challenging the conduct alleged in the complaint.

The allegations in Clewer's complaint are largely identical to those made in the three other Laker-related actions. In essence, each suit alleged that the defendant airlines engaged in a conspiracy to eliminate Laker from the U.S./U.K. air transportation market. Petition at 13a. In the first two suits, the plaintiffs were participants in the market in which the conspiracy allegedly operated. In *Laker I*, Laker was a competitor in the relevant market. *Adams* v. *Pan Am. World Airways, Inc., supra*, 640 F. Supp. at 683-84; petition at 3a. In *Laker II*, the passengers were consumers in the relevant market. 640 F. Supp. at 685. In this suit, however—as in the employees' suit—the plaintiff was affected, if at all, only indirectly by the alleged Laker conspiracy and is not a proper party to vindicate the alleged violations of the antitrust laws.

Clewer, a travel agent that received commissions for selling tickets on Laker, claims it was injured as a result of the alleged conspiracy among international airlines to eliminate Laker. Petition at 21a-23a. Although Clewer labored to adapt familiar claims made

earlier by Laker and Laker's customers to its own use, as the District Court noted, Clewer's complaint

> "fails to disguise the practical realities of the markets involved: plaintiff's market does not involve national airline companies involved in providing air transportation between the United States and the United Kingdom, but instead involves Southern California ticket sellers involved in merely distributing the tickets of Laker airlines."

Petition at 11a. The Ninth Circuit similarly recognized that Clewer's market "does not involve the production of airline service between the United States and the United Kingdom, but rather is limited to the distribution of airline tickets in Southern California." Petition at 2a.

In short, the District Court and the Ninth Circuit concluded that Clewer was neither a consumer nor a competitor in the market in which trade is alleged to have been restrained. As a travel agent, Clewer was neither a transatlantic airline nor a transatlantic airline passenger. Clewer cannot alter these facts by adding allegations to its complaint, nor would additional allegations lead to any result other than another dismissal of Clewer's claims. Clewer's complaint was dismissed not because of what it lacked, but because of what it alleged: a conspiracy, already litigated by the same counsel, that only indirectly affected Clewer.

Of equal importance, Clewer's complaint was dismissed also on the basis of those factors set forth in *Associated General Contractors* that are not dependent on the specificity of a plaintiff's complaint. The

existence of others more suited to vindicate the public interest in antitrust enforcement does not depend upon Clewer's compliance with any supposed technical rules of pleading. The existence of these persons is evident from the previous lawsuits. Similarly, the risk of duplicative recovery and the complexity in apportioning damages in this case are apparent from these other lawsuits, not from any allegations which Clewer may or may not have made. The speculative measure of Clewer's harm is apparent from Clewer's contractual relation to Laker, not from the absence of specific allegations in the complaint.

In short, the complaint in this action was not dismissed because of Clewer's noncompliance with any "technical pleading requirements." It was dismissed because it appeared beyond doubt from the facts Clewer alleged that Clewer can prove no set of facts that would entitle it to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).[5]

As a last resort, Clewer requests leave to amend its complaint in order to "plead sufficient facts to demonstrate a marketwide restraint in the market for the sale of tickets for air transportation between Southern California and the United Kingdom." Petition at 8. This request was made for the first time only after Clewer had twice lost on the motion to dismiss and had failed to avail itself of ample opportunity to amend the complaint. Clewer filed three

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[5] Given that Clewer's claim was not dismissed on the basis of any technical pleading requirements, this would hardly be an appropriate case for the Court to provide "guidance" on such an issue. *See, e.g., Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion . . . .").

briefs in the District Court and the Ninth Circuit and twice participated in oral argument, yet did not raise the issue of leave to amend until its request for rehearing en banc, which the Ninth Circuit unanimously rejected.

The proffered amendment, moreover, would change nothing. Pleading these facts would not alter the basic theory of Clewer's suit; they would merely add surplusage to a still-defective complaint. The problem with Clewer's complaint is not the quantum of supporting facts it alleges, but rather Clewer's status vis-a-vis the alleged restraints. Clewer's claim would still be entirely dependent upon proof of a conspiracy directed against Laker. Petition at 2a-3a, 11a-12a. The balance of factors under *Associated General Contractors* would still require dismissal.

Whether amended or not, Clewer's complaint seeks to redress an injury allegedly suffered as a result of a conspiracy to eliminate Laker. Under the principles clearly articulated by the Court, a travel agent indirectly injured by an alleged conspiracy against its principal lacks standing to sue for treble damages under the antitrust laws when the principal and other direct victims have already been compensated. No amendment or construction of the complaint can change the dispositive fact that the conspiracy Clewer alleges was directed at Laker.

CONCLUSION

For the foregoing reasons, respondents request that the Court deny Clewer's petition for a writ of certiorari.

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